1625. *July* 14. EARL of MORTON *against* His TENANTS.

No. 95.
A tackman having granted a subtack, and thereafter renounced the tack in favour of his master, the master was preferred, for tho' the subtacksman was in the natural possession before the date of the renunciation, it was upon a separate title, and not *qua* subtacksman.

In an action betwixt the Earl of Morton and his tenants, a tack being set by the Earl to a tacksman therein named, and to his heirs, for the space therein contained, and the tacksman being, by virtue thereof, in possession of the lands, and thereafter the tacksman making another sub-tacksman to him for the years of the tack, and disponing his right to the said sub-tacksman, who sicklike became in actual and real possession of the said lands, by labouring of the same by himself, with his own goods; after the which disposition and possession acquired by the said sub-tacksman divers years, the principal tacksman renounces his tack in the Earl's favours, who seeks removing from the lands. In which action, many of the Lords were of opinion, that the sub-tack foresaid was not a sufficient title to maintain the sub-tacksman against the said removing, albeit it was clad with possession, and that it preceded the renunciation foresaid made by the principal tacksman, in respect that the said principal tack was not set by the Earl to the tacksman, his heirs and assignees, but only set to him and his heirs, so that they thought, in respect of the tenor of the tack, which bore not assignees, that the said tacksman had no power to dispone this tack to any other, and that the pursuer was *in bona fide* to accept of renunciation from his own tacksman of the said tack, at any time, and that the same would exclude the sub-tacksman's right; but others of the Lords, and the greatest part, were of a contrary opinion, and so it was decided in favours of the defender.

1625. *July* 28.—In a removing at the Earl of Morton's instance against Hamilton, wherein the defender alleging him to be sub-tacksman to James Douglas, who had a tack of the lands libelled, set by the pursuer to him and his heirs, for years yet to run at the time of the warning, it being controverted, if this sub-tack could defend the excipient, because the principal tack was not set to the principal tacksman, his heirs and assignees, neither bore the same power to set a sub-tack, nor to in-put or out-put tenants; in respect whereof, the pursuer alleged, that he could not set a sub-tack; which point was not discussed, albeit many of the Lords appeared to incline to think, that he could not make a valid sub-tack, for the reasons alleged; but the Lords repelled the exception foresaid, founded upon the sub-tack, because the principal tacksman being debtor to the pursuer in certain by-gone duties of the tack, for the not payment whereof he was denounced rebel, he for satisfying of the said duties, had renounced the right of the tack to the pursuer; which renunciation, albeit it was made after the sub-tack made to this defender, yet the Lords sustained the same, because the sub-tack was never intimated to the pursuer, so that he could not know the same, but might lawfully take a renunciation from his own tacksman, for satisfying of the debt, and cause foresaid, whom he could never have known, by any legal deed, to be denuded of that right, in favours of any other; and whereas the defender alleged also, that

he was in possession by virtue of the sub-tack, which was enough to maintain the same, being so clad with real possession of the lands, and which was as sufficient as an intimation; so that, after the said sub-tack, the tacksman could do no deed to the pursuer which could derogate to that right acquired lawfully before. The Lords sustained the renunciation foresaid, albeit done after the sub-tack, notwithstanding of the alleged possession, because the sub-tacksman was in possession of the lands divers years before he acquired the said sub-tack; so that the continuation of that possession, which he had before, could not be ascribed to the sub-tack to be any impediment to hinder the pursuer to receive the said renunciation, and to make it unprofitable to him, except the right of the sub-tack had been formally and specifically intimated to him, as said is. No. 95.

Act. *Hope.* Alt. *Stuart & Cunningham.* Clerk, *Hay.*

Fol. Dic. v. 2 *p.* 421. *Durie, p.* 177. & 182.

1627. *June* 23. M'MILLAN *against* GORDON.

No. 96.

A spuilzie of teinds being pursued by the sub-tacksman's assignee, this exception was proponed for the defender, viz. That he had a sub-tack from the same tacksman, which, though posterior in date, yet was clothed with continual possession ever since the principal tacksman ceased to possess, whereas the pursuer never was in possession. The exception was sustained.

Fol. Dic. v. 2. *p.* 420. *Durie.*

*** This case is No. 81. p. 7018. *voce* INHIBITION.

1627. *July.* BLAIR *against* ————.

No. 97.

Found a tack valid after a comprising, whereof the entry was ———— after the comprising and sasine, in respect of the tacksman's diligence before the comprising; and thereafter repelled, in respect of the reply of retention in the person of the lessor.

Kerse MS. p. 104.

1627. *July* 11. WALLACE *against* HARVEY.

No. 98.

A tack was preferred to a comprising, in respect it was set before the denunciation, and clad with possession before sasine on the comprising; but, thereafter, it having been made appear to the Lords, that the compriser's sasine was prior to the possession attained by the tacksman, they preferred the compriser, although, be-